BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LISA HALL	)	
Claimant	)	
	)	
VS.	)	
	)	
COGENT MANAGEMENT, L.L.C.	)	
Respondent	)	Docket No. 1,042,991
	)	
AND	)	
	)	
CONTINENTAL WESTERN INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 6, 2009, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Patrick C. Smith, of Pittsburg, Kansas, appeared for claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant failed to prove by credible evidence that she sustained an accidental injury that arose out of and in the course of her employment with respondent on August 1, 2008. The ALJ further found that if claimant was injured at work on July 2, 2008, she did not report that injury to respondent within 10 days as required by K.S.A. 44-520. Accordingly, the ALJ denied claimant's request for medical benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 3, 2009, Preliminary Hearing and the exhibits; the transcript of Lisa Hall's deposition taken February 9, 2009; the transcript of Paulette Smith's deposition taken February 9, 2009, and the exhibits; the transcript of James Smith's deposition taken February 9, 2009; and the transcript of Lisa Hall's deposition taken March 23, 2009, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests that the Board reverse the ALJ's Order and find that she sustained an accidental injury that arose out of and in the course of her employment with respondent and that respondent received timely notice of that injury.

Respondent requests that the ALJ's Order be affirmed. It asserts that the ALJ was correct in concluding that claimant failed to report a July 2, 2008, work injury in a timely fashion and then created a later date of accident of August 1, 2008.

The issue for the Board's review is:

(1) Did claimant sustain an accidental injury that arose out of and in the course of her employment with respondent on August 1, 2008?

(2) If so, did claimant timely report the alleged accident to respondent?

FINDINGS OF FACT

Claimant worked as a housekeeper for respondent, a collection of businesses owned by James Smith. On November 7, 2008, she filed an Application for Hearing alleging she suffered a series of accidents from "[r]epetitive and cumulative work duties" beginning "September 1, 2008 and continuing through present." Claimant filed an Application for Preliminary Hearing on January 22, 2009, which likewise alleged accidents on "September 1, 2008 and continuing through present." But at the April 3, 2009, preliminary hearing, claimant's counsel announced that she was amending her claim to allege that she was injured on August 1, 2008.[1] She had said she was cleaning a theater and had moved a popcorn machine to clean under it when the machine started to tip over. She grabbed the machine and then picked it up and set it on top of another machine that had already been placed on the floor. In doing so, she injured her low back. Claimant has extreme pain in her buttock down the back of her right leg into the ankle, foot and toes.

Claimant admitted that her back had been hurting for about a month previous to the popcorn machine incident but said the pain was minimal and was "[j]ust here and there. Nothing that I would go to the doctor about."[2] However, she had been seen by Dr. Thomas Reifschneider, a chiropractor, on July 16, 2008, and told him she was experiencing constant severe low back symptoms that were achy and occasionally sharp, shooting and

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[1] In claimant's deposition taken February 9, 2009, she consistently stated she was injured on September 1, 2008. However, when presented with evidence that she did not work at respondent on September 1 and after reviewing medical records from SEK Urgent Care, she changed her alleged date of injury to August 1, 2008, in a second deposition taken March 23, 2009.

[2] Hall Depo. (Feb. 9, 2009) at 11.

burning with radiation of pain into her right hip that began after an injury at work on July 2, 2008. Dr. Reifschneider's records indicate that he told claimant that she should speak with her employer about her injury. Claimant saw Dr. Reifschneider again on July 17, 18 and 22. No mention was made concerning a work injury in his notes for those visits.

The last time claimant saw Dr. Reifschneider was on August 5, 2008. At that time she reported moderate to severe localized low back symptoms with radiation into her right hip. His notes also state that "since the first visit, her low back pain has been worse due to unknown reasons."[3] He recommended she be seen by a physician.

On August 5, 2008, claimant was also seen at SEK Urgent Care. It appears that this visit was before the appointment with Dr. Reifschneider because his office notes make mention of claimant having been seen by Dr. "Cousins".[4] Claimant said she told a nurse at SEK Urgent Care that she had injured her back lifting a popcorn machine at work on August 1. The nurse then attempted to call Mr. Smith, but he apparently was not available and would not be for an hour. Claimant was told that she could not be treated without Mr. Smith's permission. Claimant became angry and left.

Mr. Smith testified that claimant never told him she had been injured while moving a popcorn machine at the theater or that she had hurt herself performing any work for him. He said it was obvious to him that claimant had injured her low back and was in pain. But he testified that every time he asked her whether she had been hurt at work, she denied it. Mr. Smith said he was contacted by Dr. Brent Cosens from SEK Urgent Care and was asked if claimant's treatment would be covered under workers compensation. Because claimant had previously told him that her back problems were not work related, he told the doctor's office that claimant's treatment would not be covered by workers compensation. Mr. Smith did not know when he spoke with Dr. Cosens' office. Nor was it clear from his testimony whether claimant's denial of a work-related injury was before or after the date of her alleged injury on August 1, 2008. He admitted that the only reason Dr. Cosen's office would have called him would have been if claimant had told them she had been hurt on the job.

Claimant testified that after her injury, she did not return to work until August 8, 2008, other than doing some laundry for Mr. Smith on Saturday, August 2, which she said she did in her own home. She testified that August 8, 2008, was the first time she was able to talk to Mr. Smith after her injury on August 1. She said that she was in Mr. Smith's office cleaning that day when he came in and said, "It seems we have an issue."[5] She testified she took that to mean workers compensation, although she had not previously

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[3] P.H. Trans., Resp. Ex. 1 at 1.

[4] *Id.*

[5] Hall Depo. (March 9, 2009) at 33.

spoken to him about making a workers compensation claim. Claimant said she told Mr. Smith that she had gone to SEK Urgent Care because she had grabbed the popcorn machine and then picked it up and had hurt herself again. She said that Mr. Smith offered to call Dr. Cosens and get her in to see him, but she declined because the office had been rude to her.

On September 1, 2008, claimant was in a lot of pain, so she went to the emergency room at Mercy Health Systems of Kansas (Mercy Health) in Fort Scott.[6] She admits that she gave the emergency room personnel a history of no known injury, but said that was because she was afraid she would not be treated if she said she had been injured at work. The emergency room doctor at Mercy Health told her to see a primary care physician. After waiting two or three weeks, claimant was seen by Dr. Pankaj Gugnani, who gave her a steroid shot and some pain medication and arranged for her to have an MRI. Dr. Gugnani referred her to Dr. Larry Cordell, who in turn referred her to a neurosurgeon, Dr. Robert Tenny. Dr. Tenny told claimant that she has no other option other than to have back surgery.

Mr. Smith's wife, Paulette Smith, testified that claimant never told her that she had sustained an injury while working for respondent. She said that claimant had quit coming to work because her back was hurting, but claimant never asked for medical treatment under workers compensation. Mrs. Smith does the filing for respondent, including filing of claimant's time cards. Those time cards show that on August 1, 2008, claimant worked at the theater for 2 1/2 hours that afternoon. The time cards also confirm claimant's testimony that except for two hours she spent on Saturday, August 2, 2008, doing Mr. Smith's laundry, she did not return to work until Friday, August 8, 2008.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[6] In claimant's deposition of February 9, 2009, claimant testified that she went to both SEK Urgent Care and Mercy Health on the same day she was injured lifting the popcorn machine. Hall Depo. (Feb. 9, 2009) at 23, 35. Later in the deposition, however, claimant said she could not remember if she went to SEK Urgent Care and Mercy Health the same day. Hall Depo. (Feb. 9, 2009) at 36.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

K.S.A. 44-520 states in part:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

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[7] K.S.A. 2008 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[9] *Id.* at 278.

[10] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2008 Supp. 44-555c(k).

ANALYSIS

From this record, it is not clear when or how claimant injured her back. She now alleges a specific accident on August 1, 2008, but she admittedly was already receiving treatment in July 2008 from Dr. Reifschneider for her low back. His records reflect that she initially related her back pain to a July 2, 2008, accident at work. Furthermore, she told her employer that her back problem was not work related.

It is possible that claimant injured her back at work on July 2, 2008, and suffered a work-related aggravation on August 1, 2008, but from this record it cannot be said that this is more likely than not.

CONCLUSION

Claimant has failed to prove she suffered personal injury by accident on August 1, 2008, that arose out of and in the course of her employment with respondent and has further failed to prove that her present need for treatment is directly attributable to that alleged August 1, 2008, accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 6, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge